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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF ARIZONA,

Petitioner,

-vs-

FLOYD ORVILLE PETERSON,

Respondent.

# PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does the good-faith exception of United States v. Leon, 468 U.S. 897 (1984), apply to good-faith mistakes made by police officers in relying on a facially valid arrest warrant, or only to mistakes of judicial officers?

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## OPINION BELOW

On September 5, 1991, the Arizona Court of Appeals issued its opinion in State v. Peterson, ___ Ariz. ___, 830 P.2d 856 (Ct. App. 1991). (Appendix A.) That court held that the State could not use inherently reliable physical evidence -- the burgled items -- because officers arrested Peterson on the basis of a warrant quashed 5 years earlier, although the officers did not discover that until later. When the officers arrested Peterson, they saw the stolen property in plain view in his cabin. They obtained a search warrant for the cabin and retrieved the stolen property, which the victim identified at trial. The officers did not discover that the 1982 warrant had been quashed until after they searched Peterson's cabin pursuant to a search warrant.

The Arizona Court of appeals rejected the State's arguments that the evidence

was admissible under A.R.S. § 13-3925, the Arizona good-faith statute, and under this Court's holding in United States v. Leon. By a sharply divided 3 to 2 vote, the Arizona Supreme Court denied review on June 16, 1992. (Appendix B.)

## STATEMENT OF JURISDICTION

The Arizona Court of Appeals issued its opinion on September 5, 1991. On June 16, 1992, the Arizona Supreme Court denied review by a 3 to 2 vote. Therefore, the petition is timely under Rule 13.1, Rules of the Supreme Court.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(A).

## CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

## STATEMENT OF FACTS

The pertinent facts appear in the court of appeals' opinion at pages 2-4. (Appendix A.) John Jackson, owner of a ranch in Coconino County, had a caretaker watching his house while Jackson was in Colorado in 1987. On September 12, 1987, Wayland Robinson, the caretaker, checked the property and found several things missing, among them a commercial meat slicer, some gun reloading equipment, a milk separator, and a maple table and four chairs. Detective Gilbert Moreno of the Coconino County Sheriff's Office investigated the burglary and received reports describing the stolen items. Moreno was aware that Meridith Walzer, a realtor with whom Jackson had listed his ranch, met with Respondent at Respondent's request, and showed Respondent Jackson's ranch on September 10, just 2 days before the burglary.

In the late afternoon of October 28, 1987, Detective Moreno made an inquiry through National Crime Information Center (hereinafter NCIC). At 5:00 p.m. he discovered that there was an outstanding felony warrant from the Flagstaff Police Department for the arrest of Respondent. To confirm the existence of this warrant, Moreno gave a copy of the computer printout to Sergeant Heilburg. Sergeant Heilburg checked with the Flagstaff police. Their records clerk confirmed that he had a copy of the warrant in the department files.

Having received confirmation of the outstanding warrant, Detective Moreno, accompanied by other officers, arrested Respondent at his residence about 7:45 p.m. Because Respondent was not dressed properly, he invited officers inside while he dressed. Standing in Respondent's residence, Detective Moreno observed a milk separator with a red base, stainless steel bowl and attachments that

enabled it to run manually or by motor, a commercial meat slicer, and a maple dinette set and four chairs. Moreno filled out an affidavit and obtained a search warrant for Respondent's residence because he knew that items like these had been stolen from the Jackson ranch and that a realtor had shown Respondent that property only 2 days before the burglary. The affidavit for the warrant stated that Moreno was aware that Shawna Dishman (who later married Respondent), was trying to bond Respondent out and, if she was not successful in doing that, she could return to Respondent's residence and move the items before police could execute a search. For that reason, Moreno requested and received permission for a nighttime search.

Only after police executed the search warrant and seized the evidence, did they discover that the warrant issued for Respondent in 1982 had been quashed in 1982. Flagstaff police removed it from the

computer files, but it was mistakenly reinserted on February 13, 1987, several months before the burglary. Sergeant Harry Bailey of the Flagstaff police believed that this administrative error probably occurred during an annual review of warrants in the department's files. His testimony made it clear, however, that the Coconino County Sheriff's Office called the Flagstaff police to verify the existence of the warrant, and that the Flagstaff police, after checking their files and finding the warrant, told the sheriff's office that there was a valid outstanding warrant for Respondent.

At the suppression hearing, the prosecutor relied on the good-faith exception in the Arizona statute and this Court's decision in United States v. Leon, 468 U.S. 897 (1984). The trial court denied Respondent's motion to suppress the evidence seized from his residence.

## REASONS FOR GRANTING THE WRIT

BECAUSE OF THE GREAT DIVERGENCE OF OPINION, THIS COURT SHOULD DECIDE WHETHER TO APPLY THE GOOD-FAITH EXCEPTION OF UNITED STATES V. LEON TO OBJECTIVELY REASONABLE ACTIONS BY THE POLICE IN RELIANCE ON MISTAKEN INFORMATION PROVIDED BY A POLICE AGENCY.

### A.

### The Good-Faith Exception Applied To the Mistakes of a Magistrate.

In United States v. Leon, 468 U.S. 897 (1984), this Court modified the judicially fashioned exclusionary rule to permit use of reliable physical evidence seized by officers acting in reasonable reliance on a search warrant issued by a magistrate even though, ultimately, a court determined that there was no probable cause to issue the warrant. The Court reasoned that the deterrent purpose of the Fourth Amendment found no vindication in the exclusion of the evidence:

> If exclusion of evidence . . . is to have any deterrent effect, . . . it must alter the behavior of individual law enforcement officers or the policies of their departments.

United States v. Leon, 468 U.S. at 918.

The magistrate in Leon mistakenly believed that he had sufficient information to support probable cause to issue the warrant. He was wrong, but the Court did not attribute his mistake to the police officers who reasonably relied on his conclusion that probable cause did exist.

The question this case poses -- and it is one of national importance to law enforcement -- is whether the reasoning of Leon should extend to situations where the police, instead of the magistrate, made a mistake, but nonetheless acted in an objectively reasonable manner.

B.

There is Widespread Disagreement Over Whether Leon Should Apply to Mistakes of the Police or Whether Any Mistake by the Police Requires Suppression of the Evidence.

The courts of this nation are sharply divided over whether Leon applies to those situations where the police make an error, such as failure to update computer files, and an officer unaware of that error relies

on the mistaken information to make an arrest and seize evidence. The Arizona Court of Appeals refused to apply Leon in this case because one police agency made a mistake in the information in its computer files. Petitioner emphasizes that this administrative error could not have been a pretext to arrest because it occurred 7 months before Respondent committed the burglary. Respondent presented no proof to the trial court that the Flagstaff police habitually made such errors. The Arizona Court of Appeals found nothing objectively unreasonable about Detective Moreno's conduct in relying on the arrest warrant. The court focused instead on the fact that the Flagstaff police made a mistake by re-inserting the warrant into their computer system, and attributed responsibility for the mistake to Detective Moreno of the Coconino Sheriff's Office. (Appendix A.) Noting this Court's reference in Leon to Whiteley v. Warden,

401 U.S. 560, 568 (1971), the Arizona Court of Appeals concluded that Leon did not apply because "Any mistake was that of the police." (Appendix A.) Thus, Detective Moreno's undisputably reasonable reliance on an arrest warrant that he believed valid was immaterial. (Id.)[1]

Many courts have disagreed with the rationale of the Arizona Court of Appeals, i.e., any mistake by the police is collectively attributable to all police officers and mandates suppression of the evidence. For instance, the Second Circuit has held that the good-faith exception of Leon did apply where the arresting Vermont officer reasonably relied upon an outstanding warrant for the defendant that

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1. In reaching that conclusion, the Arizona Court of Appeals failed to recognize or discuss the fact that the officer who issued the radio bulletin in Whiteley v. Warden did not state sufficient facts to establish probable cause for the arrest. In this case, Respondent never contested that the magistrate who issued the warrant had probable cause to do so.

the New Hampshire police kept in their files for over 3 years in violation of a plea agreement. United States v. Towne, 870 F.2d 880, 884-85 (2d Cir. 1989), cert. denied, 490 U.S. 1101 (1990). See also United States v. De Leon-Reyna, 930 F.2d 396, 399-402 (5th Cir. 1991) (en banc) (although the arresting officer arguably created error by not using proper code words to call in a license plate check, he acted in an objectively reasonable fashion in arresting the defendant after receiving erroneous information about the license plate); Durio v. State, 807 S.W.2d 876, 877-78 (Tex. Ct. App. 1991) (Leon applied to evidence seized by officers relying on a warrant subsequently determined to have been executed).

Even before this Court's decision in Leon, several courts refused to apply Whiteley v. Warden where the warrant was based on probable cause and delay in updating the information was of short

duration. See, e.g., Childress v. United States, 381 A.2d 614, 616 (D.C. 1977) (4-day delay in updating information); Mayberry v. State, 561 S.2d 1201, 1202 (Fla. App. 1990) (no showing of excessive and unacceptable delay); State v. Cross, 164 N.J. Super. 368, 396 A.2d 604, 605-07 (1978) (1-month delay in updating files); Commonwealth v. Riley, 284 Pa. Super. 280, 425 A.2d 813, 816 (1981) (4-day delay).

The split in authority is evidenced by those jurisdictions holding that police are collectively responsible for updating their files and that Leon does not permit introduction of evidence seized by an officer who makes an arrest on the basis of information not timely purged from police files. See, e.g., Ott v. State, 325 Md. 206, 600 A.2d 111 (1992); People v. Joseph, 128 Ill. App. 3d 668, 83 Ill. Dec. 883, 470 N.E.2d 1303 (1984); People v. Ramirez, 34 Cal. 3d 541, 194 Cal. Rptr. 454, 668 P.2d 761 (1983); People v. Fields, 785 P.2d 611,

613 (Colo. 1990); Albo v. State, 477 So. 2d 1071, 1073-75 (Fla. App. 1985); State v. Taylor, 468 So. 2d 617, 623, (La. App.), cert. denied, 472 So. 2d 918 (La. 1985).

C.

Necessity For This Court's Intervention.

The sharp division of authority highlights the need for clarification and guidance from this Court. Both state and federal courts need to know whether every record-keeping mistake by the police requires suppression of the evidence or whether United States v. Leon applies to those situations in which an officer acts in objectively reasonable reliance on a warrant the original probable cause for which the Respondent has never challenged. In this age of computers, similar mistakes are bound to recur.

If the purpose of the exclusionary rule is to deter police misconduct or alter improper police policies, the Arizona Court of Appeals' decision in this case, and

similar decisions from other jurisdictions, do nothing to accomplish that goal. Exclusion of evidence seized on the basis of a good-faith mistake, whether the mistake of a magistrate or a police officer, serves no recognized purpose of the Fourth Amendment.

## CONCLUSION

Petitioner respectfully asks the Court to grant certiorari to address this issue of nation-wide importance, and to reverse the decision of the Arizona Court of Appeals.

Respectfully submitted,

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CRM89-1979/2026d/bl

# A P P E N D I C E S

**STATE of Arizona, Appellee,**

v.

**Floyd Orville PETERSON, Appellant.**

**No. 1 CA-CR 89-1299.**

Court of Appeals of Arizona,
Division 1, Department E.

Sept. 5, 1991.

As Corrected Sept. 5, 1991.

Review Denied June 16, 1992.*

Defendant was convicted in the Superior Court, Coconino County, Cause No. CR-13448-87, H. Jeffrey Coker, J., of knowingly possessing property of another with a value of $500 or more but less than $1,000. Defendant appealed. The Court of Appeals, Claborne, P.M., held that good faith exception to exclusionary rule did not permit introduction of evidence obtained through invalid arrest warrant.

Reversed and remanded.

* Corcoran and Martone, JJ., of the Supreme Court, voted to grant review.

**1. Arrest 63.4(2)**

Probable cause to arrest exists if police have reasonable grounds to believe that offense is being or has been committed by person arrested. U.S.C.A. Const. Amend. 4.

**2. Arrest 63.4(2, 11)**

Totality of facts and circumstances determines whether probable cause to arrest is present, and it may be established by collective knowledge of all law enforcement personnel involved. U.S.C.A. Const. Amend. 4.

**3. Arrest 65**

Officers called upon to aid other law enforcement officers effecting arrest warrant are entitled to assume that instigating officers were acting upon proper determination of probable cause; however, when instigating officers lack proper determination of probable cause, otherwise illegal arrest is not insulated from challenge based upon arresting

officer's reliance that warrant was obtained with requisite probable cause.

**4. Criminal Law 394.4(9)**

Statutory good faith exception to exclusionary rule did not permit introduction of evidence obtained through invalid arrest warrant which had been quashed and removed from police computer record system in 1982 but had somehow been reentered in system and appeared in records at time of arrest in 1987. A.R.S. § 13-3925.

**5. Criminal Law 394.5(4)**

Burden is upon State to prove that statutory good faith exception to exclusionary rule applies. A.R.S. § 13-3925.

**6. Criminal Law 394.4(9)**

Leon good faith exception to exclusionary rule did not permit introduction of evidence obtained through invalid arrest warrant which had been quashed and removed from police computer

record system but which had somehow been reentered in computer system; there was no erroneous judicial conduct on which police officers reasonably relied and no contention that warrant was erroneously reentered into police computer system at behest of any judicial officer but, rather, any mistake was that of police. U.S.C.A. Const.Amend. 4.

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Grant Woods, Atty. Gen. by Paul J. McMurdie, Chief Counsel, Crim. Div., and Jack Roberts, Asst. Atty. Gen., Phoenix, for appellee.

Kathleen A. Kelly, Phoenix, for appellant.

OPINION

CLABORNE, Presiding Judge.

Does the "good faith" exception to the exclusionary rule permit the introduction of evidence obtained through an invalid arrest warrant? The trial court answered

in the affirmative. Under the circumstances presented in this case, we reverse.

Floyd Orville Peterson (appellant) was charged with theft of property with a value in excess of $1,000.00, a class 3 felony in violation of A.R.S. § 13-1802. A jury found appellant guilty of one count of knowingly possessing property of another with a value of $500.00 or more, but less than $1,000.00, a class 4 felony. The trial court suspended the imposition of sentence and placed appellant on probation for two years.

Before trial, appellant moved to suppress evidence found in his home on the ground that it was the fruit of an illegal arrest. The trial court denied the motion and, after conviction, the appellant appealed challenging this ruling.

## FACTUAL BACKGROUND

On September 12, 1987, a caretaker reported that the home of John Jackson located outside of Flagstaff had been burglarized sometime within the preceding ten days. Various household items, including a commercial meat slicer, a milk separator, and a dinette set, were determined to have been stolen. Investigation of the case was assigned to Detective Gilbert Moreno of the Coconino County Sheriff's Department. The detective focused on appellant as a possible suspect because he and a companion had toured the Jackson property with a real estate agent on September 10.

When the officer ran a computer check with the Arizona Criminal Information Center (ACIC), he received information that appellant was the subject of an outstanding arrest warrant, issued in 1982, for failure to return rental property. The detective confirmed the

existence of the warrant by having a fellow officer check with the originating agency, the Flagstaff Police Department. The detective did not attempt to contact the Flagstaff Justice Court which had issued the warrant. Detective Moreno accompanied four other officers to appellant's cabin to effect the arrest on the 1982 warrant. Officer Moreno testified that, by participating in the arrest, he hoped that he would be able to observe property stolen in the burglary of the Jackson residence when he was inside appellant's cabin.

While inside the cabin at the time of the arrest, Detective Moreno observed a milk separator, a meat slicer, and a dinette set similar to those reported stolen from the Jackson home. The detective incorporated this information, along with a report of the property reported stolen and the fact that appellant had been on the Jackson

premises prior to the discovery of the break-in, in a search warrant affidavit presented to a superior court judge. The search warrant was issued and served on October 28. The property previously observed by Detective Moreno was seized, identified by John Jackson, and ultimately introduced as evidence at trial.

Testimony at the hearing on appellant's motion to suppress focused on the 1982 arrest warrant. Harry W. Bailey, a records custodian for the Flagstaff Police Department, testified that the arrest warrant had been quashed and removed from the system in 1982. He said, "[S]omehow, this warrant re-appeared in our records section on 2-13 of '87, and it was re-entered [in the computer system]." According to Bailey, the police department never determined how or why the warrant re-appeared for entry into the computer

system. Bailey said: "It's an error on our part as far as putting it back in."

In response to the trial judge's inquiry, the state conceded that the arrest warrant was invalid and the fruits of the arrest, including Detective Moreno's observations at appellant's cabin, would have to be suppressed unless the court found that the arrest was made in "good faith" reliance on the existence of the warrant. After receiving supplemental briefing on the issue of good faith, the trial judge denied appellant's motion without further comment.

## DISCUSSION

Appellant argues that the trial court erred in not granting his motion to suppress the evidence seized at his home. He contends that because the arrest warrant used to gain access to his home was invalid, the search warrant

issued on the basis of information gained through the arrest warrant was likewise invalid. As such, appellant argues that the evidence seized in his home should have been suppressed.

[1,2] The police may not arrest an individual absent probable cause. U.S. Const. amend IV. Probable cause to arrest exists if the police have "reasonable grounds to believe that an offense is being or has been committed by the person arrested...." State v. Lawson, 144 Ariz. 547, 553, 698 P.2d 1266, 1272 (1985) (quoting State v. Torrez, 112 Ariz. 525, 527, 544 P.2d 207, 209 (1975), cert. denied, 425 U.S. 916, 96 S.Ct. 1517, 47 L.Ed.2d 767 (1976). The totality of the facts and circumstances determines whether probable cause is present and it may be established by the collective knowledge of all law enforcement personnel

involved. Lawson, 144 Ariz. at 553, 698 P.2d at 1272.

[3] The authority of police officers to arrest an individual based upon information received from other officers is restricted by Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971). The court recognized that officers called upon to aid other law enforcement officers effecting an arrest warrant are entitled to assume that the instigating officers were acting upon a proper determination of probable cause. Id. at 568, 91 S.Ct. at 1037. However, when the instigating officers lack a proper determination of probable cause, an otherwise illegal arrest is not insulated from challenge based upon the arresting officer's reliance that the warrant was obtained with the requisite probable cause. Id.

Arizona courts have since applied this rule, finding arrests illegal when the

originating officers lacked probable cause, see, e.g., State v. Richards, 110 Ariz. 290, 518 P.2d 113 (1974), and upholding them when probable cause was present. See, e.g., State v. Crivellone, 138 Ariz. 437, 675 P.2d 697 (1983). In State v. Brennan, 22 Ariz. App. 471, 528 P.2d 857 (1974), we considered facts much like the one now before us. The defendant was convicted of possession of marijuana found during his arrest on a warrant for failure to appear for a traffic citation. We found that arrest warrant invalid because it was not issued upon a sworn complaint approved by a magistrate. Id. at 473, 528 P.2d at 859. As a result, we held the search of the defendant was invalid because it was the product of the warrantless arrest. Id.

Erroneous computer information cases regarding the existence of a valid warrant have fared no better. A majority

of the decisions have held the arrest and the accompanying search invalid. See United States v. Mackey, 387 F.Supp. 1121 (D.Nev.1975); People v Ramirez, 34 Cal.3d 541, 194 Cal.Rptr. 454, 668 P.2d 761 (1983); Pesci v. State, 420 So.2d 380 (Fla.App.1982); People v. Joseph, 128 Ill.App.3d 668, 83 Ill.Dec. 883, 470 N.E.2d 1303 (1984); People v. Lawson, 119 Ill.App.3d 42, 74 Ill.Dec. 668, 456 N.E.2d 170 (1983); People v. Decuir, 84 Ill.App.3d 531, 39 Ill.Dec. 912, 405 N.E.2d 891 (1980); People v. Jennings, 54 N.Y.2d 518, 446 N.Y.S.2d 229, 430 N.E.2d 1282 (1981); People v. Watson, 100 App.Div.2d 452, 474 N.Y.S.2d 978 (1984); People v. Lent, 92 App.Div.2d 941, 460 N.Y.S.2d 369 (1983); State v. Trenidad, 23 Wash.App. 418, 595 P.2d 957 (1979). In most of these cases, the courts have relied upon Whiteley, supra, in reaching this result. In those cases where the arrest has been upheld despite

erroneous information regarding the existence of a warrant or other basis for the stop, the courts have emphasized the short period of time that the police records had been outdated. Annotation, Validity of Arrest Made in Reliance Upon Uncorrect or Outdated Warrant List or Similar Police Records, 45 A.L.R. 4th 550, 554 (1986). See Childress v. United States, 381 A.2d 614 (D.C.App.1977) (traffic warrants had been satisfied four days prior to arrest); Patterson v. United States, 301 A.2d 67 (D.C.App. 1973) (police notified of correct information fifteen hours prior to stop); Commonwealth v. Riley, 284 Pa.Super. 280, 425 A.2d 813 (1981) (arrest warrant satisfied four days earlier).

[4] Here, the police relied on an arrest warrant which was issued and quashed five years before the incident being investigated! The state recognizes that the arrest warrant was invalid, but

maintains that the seizure should be upheld because the officers' reliance on the arrest warrant was objectively reasonable and in good faith. The good faith exception to the exclusionary rule is set forth in A.R.S. § 13-3925, and under the analysis contained in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

A. "Good Faith" Under A.R.S. § 13-3925

A.R.S. § 13-3925 provides in pertinent part:

> A. If a party in a criminal proceeding seeks to exclude evidence from the trier of fact because of the conduct of a peace officer in obtaining the evidence, the proponent of the evidence may urge that the peace officer's conduct was taken in a reasonable, good faith belief that the conduct was proper and that the evidence discovered should not be kept from the trier of fact if otherwise admissible.

B. The trial court shall not suppress evidence which is otherwise admissible in a criminal proceeding if the court determines that the evidence was seized by a peace officer as a result of a good faith mistake or technical violation.

C. In this section:

1. "Good faith mistake" means a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause.

2. "Technical violation" means a reasonable good faith reliance upon:

* * * * * *

(b) A warrant which is later invalidated due to a good faith mistake.

Arizona courts have had few occasions to apply this statute, and we have found no case in which the issue has been

raised in a factual setting such as the one presented here.[1]

Colorado has a statute almost the same as ours. In People v. Mitchell, 678 P.2d 990 (Colo. 1984), the Colorado Supreme Court had the same issues presented to it on similar facts as presented in this appeal. The defendant had been stopped for speeding. A dispatcher scanned a computer screen and informed the investigating officer that there was an outstanding arrest warrant for the defendant for the failure to pay a

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1. In State v. Nahee, 155 Ariz. 114, 745 P.2d 172 (App.1987), we relied in part on A.R.S. § 13-3925(A) in reversing a trial court order suppressing physical evidence that had been seized incident to an arrest that violated a Yavapai Apache tribal statute. In Nahee, we did not analyze the statutory provisions pertaining to "good faith mistake" and "technical violation," advanced by the state in this case. However, we do recognize that Nahee involved the suppression of the fruits of an allegedly illegal arrest, and thus reject defendant's contention that A.R.S. § 13-3925 does not apply to arrests but rather only to seizures of evidence.

traffic fine. The dispatcher manually examined the warrant file to confirm this information. Acting on this information, the officer arrested the defendant and found cocaine in his pocket. Subsequently, it was determined that the warrant had been issued in error, since the defendant had actually paid the traffic fine prior to its issuance.

The defendant moved to suppress the cocaine contending that it was the product of an unconstitutional arrest based upon an invalid arrest warrant. The trial court granted the motion and the state sought reversal on the grounds of "good faith mistake" and "technical violation," terms defined in the Colorado statute precisely as they are in Arizona. With regard to the first ground, the Colorado court stated:

> [The statute] defines a "good faith mistake" as a "reasonable judgmental error concerning the existence of facts

which if true would be sufficient to constitute probable cause." This statutory definition restricts "good faith mistake" to mistakes based on reasonable judgmental errors of fact rather than mistakes of law. Indeed, it has been observed that it would be extremely difficult to determine what constitutes a reasonable mistake of law, requiring as it would an inquiry into "objective extrapolations of existing law" and "inferences from existing law" that an officer should have drawn. 1 W. LaFave, [Search and Seizure] at § 1.2 at 15 (Supp.1984). In the case of an arrest warrant, the statutory definition of "good faith mistake" is apparently intended to include reasonable judgmental errors of fact made by an officer in applying for or in executing a warrant, or similar factual errors made by a court in issuing a warrant. Viewed in this

> light, the statutory definition of "good faith mistake" serves to make explicit what is already implicit in federal exclusionary rule doctrine.

Id. at 995 (emphasis in original; case citation omitted).

The court concluded that the arrest of the defendant did not involve a "good faith mistake." Id. at 995-96. The arresting officer had been correctly informed by his dispatcher that there was a warrant outstanding. The warrant, however, was invalid and there was no evidence in the record to show that it had been issued due to "some reasonable judgmental error concerning the existence of facts which if true would have constituted possible cause." Id. at 995. As a result, the court held the "good faith mistake" portion of the statute simply could not be used to validate an arrest made on an invalid warrant. Id.

The court also found that the arrest could not be supported by reference to the term "technical violation." Id. at 996. As in Arizona, the term "technical violation" in Colorado means "a reasonable good faith reliance upon ... a warrant which is later invalidated due to a good faith mistake...." Colo.Rev.Stat. 16-3-308(2)(b). The court found that the language did not apply because the warrant had not been voided due to a mistake at all, saying:

> On the contrary, the warrant was void not because the facts supporting it fell somewhat below the constitutional threshold of probable cause, but, so far as the record shows, because there were no facts at all to support its issuance. Whatever the outer limit of the "technical violation" exception might be, we are satisfied that it was not intended to encompass an arrest warrant that is totally devoid of any

> factual support and comes into being only as the result of some unexplained mistake on the part of the issuing court. The defect in such a warrant is a fundamental one, far beyond the purview of a "technical violation."

Mitchell, 678 P.2d at 996. Accord People v. Fields, 785 P.2d 611 (Colo.1990) (applying Mitchell, court suppressed fruits of an arrest based on erroneous computer information that defendant was subject of parole violation warrant).

The same analysis guided the Florida Court of Appeals in invalidating a search in Pesci v. State, 420 So.2d 380 (Fla.App.1982). Confronted with an arrest of defendant upon a warrant that had been quashed two months before, the court rejected arguments that reliance by police upon the existence of a warrant was justified as either a "good faith mistake" or "technical violation:"

The police officer in this case was not exercising any judgment as to whether the facts known to him constituted probable cause, but was instead relying solely on information received by radio that there was an outstanding alias capias. There is no contention or showing here that the officer, at the time he stopped defendant for a minor traffic infraction, had any other justification for intruding upon defendant's protected Fourth Amendment interest, therefore the "good faith mistake" exception cannot apply. Neither would the "technical violation" exception have any application here because the warrant (alias capias) was void or nonexistent at the time defendant was arrested. The exception would apply only if the warrant had been presumptively valid at the time of

the arrest but was invalidated by a subsequent judicial determination.

Id. at 382 (emphasis supplied).[2]

We agree with the analysis of Mitchell and Pesci. The conduct of the investigating officers in this case is not shielded by A.R.S. § 13-3925, because that conduct does not meet the definition of "good faith mistake" or "technical violation" set out in that statute. The record is completely silent concerning any evidence which would indicate that the officers had information which would provide a basis for a good faith belief

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2. The Florida court construed the terms "good faith mistake" and "technical violation" as they were defined by a federal appellate decision, United States v. Williams, 622 F.2d 830 (5th Cir. 1980), cert. denied, 449 U.S. 1127, 101 S.Ct. 946, 67 L.Ed.2d 114 (1981). The Williams opinion, in turn, relies upon the definition of the terms provided by Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim L. & Criminology 635 (1978). The definitions of the terms in these sources are virtually identical to those found in A.R.S. § 13-3925(C).

in the warrant's validity. Indeed, the police records custodian called to testify stated that the Flagstaff Police Department did not know how the warrant came to be re-entered into the system five years after it had been quashed.

[5] We emphasize that the burden is upon the state to prove that a 'good faith' exception to the exclusionary rule applies. The general rule is that the prosecutor has the burden of proving, by a preponderance of the evidence, the lawfulness of the acquisition of evidence used at trial. Rule 16.2, Arizona Rules of Criminal Procedure. The burden to prove good faith is also established by the specific command of A.R.S. § 13-3925(A) that "the proponent of the evidence may urge that the peace officer's conduct was taken in a reasonable, good faith belief that the conduct was proper."

B. "Good Faith" Under United States v. Leon

[6] In addition to A.R.S. § 13-3925, the state relies upon United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) for the proposition that the objective good faith of the arresting officers should preclude the exclusion of evidence.

In Leon, the Supreme Court held that the exclusionary rule does not apply where the government establishes that a police officer exhibited "objectively reasonable" reliance on a magistrate's determination of probable cause and on the technical sufficiency of the search warrant issued. Id. at 922, 104 S.Ct. at 3420. As a result, the Court held that evidence seized pursuant to a warrant need not be suppressed even though the magistrate's finding of probable cause was later found to be erroneous. Id. The Court reasoned that deterrence of police misconduct would not

be furthered in a situation where officers have sought the independent judicial scrutiny of the search, via a warrant application, which is favored under the fourth amendment. Id. at 920-21, 104 S.Ct. at 3419.

The facts in this case certainly stretch mightily the state's claim that the reasoning of Leon should apply to the issue here. Only one case seems to support the state's position. In United States v. Towne, 870 F.2d 880 (2d Cir.), cert. denied, 490 U.S. 1101, 109 S.Ct. 2456, 104 L.Ed.2d 1010 (1989), the Court considered the arrest of the defendant under a New Hampshire warrant which had been kept in an active police computer file in violation of a plea agreement made three years earlier. After receiving information about the existence of a warrant, the arresting officer checked with the New Hampshire County and received a certified copy of the warrant

before arresting the defendant. Citing Leon, and with minimal further analysis, the court found the reliance of the arresting officer on the warrant to have been objectively reasonable. Id. at 885. The arrest and resulting search were primarily upheld based on the view that exclusion of the evidence would not further the purpose of the rule, that is, punishment of police misconduct. Id.

People v. Joseph, 128 Ill.App.3d 668, 83 Ill.Dec. 883, 470 N.E.2d 1303 (1984), reached a different result. The defendant had been arrested, without independent probable cause, on the basis of a warrant that had been quashed eleven days earlier. The court, focusing on what it perceived as a growing problem with police reliance on electronically recorded and disseminated criminal files, suppressed evidence discovered in a search incident to defendant's arrest. Id. 128 Ill.App.3d at 673, 83 Ill.Dec.

at 886, 470 N.E.2d at 1306. Rejecting the application of Leon to the conduct of the police, the court stated:

> In Leon, the Supreme Court observed that the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. The situation in the instant case reflects a matter within the responsibility and control of police authorities who failed to update their records to accurately reflect defendant's current status. In this age of computerization, we do not believe it would be appropriate to sanction the arrest here, thereby allowing law enforcement authorities to rely on an error of their own making. Moreover, it is our opinion that the good-faith reliance of the arresting officer, in acting upon information provided to him through police channels, cannot overcome the intrusion

upon defendant's fourth amendment rights.

Id. 128 Ill.App.3d at 672, 83 Ill.Dec. at 886, 470 N.E.2d at 1306 (citations omitted). In addition to People v. Mitchell, supra, other courts have rejected claims of good faith justification in this precise factual context. See, e.g., People v. Ramirez, 34 Cal.3d 541, 194 Cal.Rptr. 454, 668 P.2d 761 (1983); People v. Jennings, 54 N.Y.2d 518, 446 N.Y.S.2d 229, 430 N.E.2d 1282 (1981).

We find the analysis of People v. Joseph, supra, persuasive concerning the difference between Leon and this case. Unlike Leon, this case presents a situation in which there is no dispute that the warrant in question was invalid -- in effect, nonexistent at the time it was executed by the investigating officers. Unlike Leon, this case suggests no erroneous judicial conduct on

which police officers reasonably relied. The warrant in question was quashed by the issuing court and there is no contention in this case that the warrant was erroneously re-entered into the police computer system at the behest of any judicial officer. Any mistake was that of the police. Under Whiteley, the fact that Officer Moreno acted on information from another agency is immaterial.

It must also be mentioned that Leon acknowledged the continued vitality of Whiteley v. Warden, supra, when the Leon court said:

> References to "officer" throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the

probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of circumstances under which the warrant was obtained to conduct the search. See Whiteley v. Warden, 401 U.S. 560, 568, 91 S.Ct. 1031, 1037, 28 L.Ed.2d 306 (1971).

Leon, 468 U.S. at 923, n. 24, 104 S.Ct. at 3420, n. 24 (emphasis added).

CONCLUSION

Detective Moreno's presence at the execution of the warrant for appellant's arrest permitted him to view the objects which he later described in his search warrant affidavit. The actual seizure of this evidence was accomplished based on a search warrant issued by a superior court judge who was presented with this affidavit. The detective conceded that

without his observations at the time of the arrest, there would have been insufficient facts to establish probable cause.

The illegal conduct in this case, the arrest of appellant pursuant to an invalid warrant, cannot be exploited by officers who relied on information obtained in that arrest to procure a search warrant. We said in State v. Hicks, 146 Ariz. 533, 707 P.2d 331 (App.1985), aff'd on other grounds sub. nom. Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987):

> The state argues that because the officers subsequently obtained a search warrant that his actions ought to be validated under the "good-faith" exception to the exclusionary rule. The state cites A.R.S. § 13-3925 and United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Neither is applicable. The statute

> simply does not speak to this situation. And, while Leon does hold that officers may reasonably rely on a magistrate's assessment of probable cause in issuing a warrant and that exclusion need not be ordered if the magistrate is wrong in that assessment, it does not hold that a subsequent warrant validates an earlier illegal search. Police officers cannot launder their prior unconstitutional behavior by presenting the fruits of it to a magistrate.

Hicks, 146 Ariz. at 535, 707 P.2d at 333. Accord State v. Britain, 156 Ariz. 384, 752 P.2d 37 (App.1988). The same analysis applies here.

The state's argument concerning the "plain view" doctrine does not apply here since this is not a warrantless seizure case.

The appellant's conviction was premised on possession of items which were seized

as a result of his illegal arrest. The admission of that evidence is not harmless error. We have reviewed the entire record for fundamental error and have found none.

We reverse the conviction and remand the matter to the trial court for the entry of an order granting appellant's motion to suppress the evidence seized and for a new trial.

GRANT, C.J., and SHELLEY, J., concur.

NOEL K. DESSAINT
CLERK OF THE COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

SUPREME COURT

STATE OF ARIZONA

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June 17, 1992

RE: **STATE OF ARIZONA vs. FLOYD ORVILLE PETERSON**
Supreme Court No. CR-91-0358-PR
Court of Appeals No. 1 CA-CR 89-1299
Coconino County No. CR-13448-87

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 16, 1992, in regard to the above-referenced cause:

**ORDERED: Petition for Review = DENIED.**

**Justices Corcoran and Martone voted to grant review.**

Record returned to the Court of Appeals, Division One, Phoenix, this 17th day of June, 1992.

NOEL K. DESSAINT, Clerk

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